DISSENTING OPINION OF JUDGE SCHWEBEL

1. I regret that I am unable to concur in the Judgment of the Court denying the request of Italy for permission to intervene in the pending proceedings between Libya and Malta. Italy clearly "has an interest of a legal nature which may be affected by the decision in the case" between Libya and Malta. Since Italy thus fulfils the provisions of Article 62 of the Statute, the Court should have decided positively upon Italy's request for permission to intervene.

2. The Court's negative Judgment does not deny that Italy "has an interest of a legal nature" in the proceedings between Malta and Libya. But it rejects the Italian application to intervene, apparently on three grounds. It indicated that Italy's interest may not be "affected" by the decision in the case. It concludes that Italy, seeking, as in the view of the Court it does, a decision on a "dispute" between it and the principal Parties, does not request "genuine intervention" within the meaning of the Statute. And it decides that, since Italy seeks a decision upholding the rights it asserts against the principal Parties in that dispute, the Court can have jurisdiction to grant such a decision only with the consent of the principal Parties or by showing of a valid title of jurisdiction between Italy and those Parties, which is lacking. It is believed that the Court is in error on all three counts. This opinion will accordingly endeavour to demonstrate why the Italian request to intervene meets the terms of Article 62 and why that request is one for "genuine intervention". It will then consider what is the only substantial ground of objection to it : the alleged absence of a jurisdictional link between Italy and the principal Parties to the case.

Italy's "Interest of a Legal Nature"

3. In its Application for permission to intervene, Italy submitted that :

> "some of the areas of continental shelf disputed between Malta and Libya in the present proceedings are areas over which Italy considers that it has undeniable rights. Taking into account the object of the controversy between the two Parties to the present proceedings, Italy consequently has a legal interest which is indisputably *en cause* in the case. Its position is even, in procedural law, an absolutely classic case for intervention, and one in which intervention in practice is always admitted : the situation in which the intervener relies on rights as the true *dominus* of the object which is disputed, or a part thereof.
>
> . . . . . .

> the Court will not confine itself to laying down principles and rules of international law. It will have to determine how such principles and rules should be applied by the Parties in drawing the delimitation line. That line will thus be predetermined in the Court's judgment with a sufficient degree of precision to prevent the Parties meeting difficulties at the final stage of the delimitation operation.
>
> In addition, it is perfectly evident that such a predetermined line, passing within areas which Italy regards as appertaining to itself, would *de facto* and *de jure* effect the attribution to the Parties of the areas of continental shelf to be delimited by that line.
>
> It would be difficult for Italy subsequently to obtain recognition of its rights, either by negotiation, since the Party with which it sought to negotiate would obviously take refuge behind the Court's judgment and refuse to make any concessions, or by proposing to submit the dispute to the decision of the Court, which would, in addition, be bound by its previous judgment." (Paras. 11-12.)

In the oral hearing, counsel for Italy indicated in what areas of the continental shelf at issue between the principal Parties claims of Italy overlap claims of Malta (and, in effect, of Libya). Coordinates of the Italian claims were provided in answer to a question posed by Judge de Lacharrière. Italy's counsel maintained that :

> "The main point . . . is that in a number of crucial zones among those claimed by Malta, it would be for Italy and not for Malta to proceed to a delimitation vis-à-vis Libya."

4. Where States A and B, parties to a case before the Court, make territorial claims against each other, and State C, which requests permission to intervene, maintains that A and B seek a judgment of the Court to territory to part of which C has better title, it is obvious that C "has an interest of a legal nature which may be affected by the decision in the case". A more compelling case of a legal interest of an intervening State would be hard to imagine. That in substance is Italy's position in the proceedings at bar.

5. It has been maintained that, while Italy indubitably considers that it has the foregoing interest of a legal nature, it has not proved that it has and that the Court should reject its request for permission to intervene because of the lack of that proof. However, while Italy would have to prove that its interest of a legal nature is well founded in order to prevail on the merits of a case in which permission to intervene were to have been granted, it need not so prove in order for its request to intervene to be granted. To require that it present such proof is to require it to argue and sustain a case which it has not been accorded permission to present. All that the Court at this stage need establish is that the interest of a legal nature which Italy makes out is, prima facie, a plausible interest. Nor need Italy show that its interest

was the subject of dispute with the principal Parties before it filed its Application to intervene. The idea of intervention is that two parties are litigating *their* dispute ; a third party, apprehending that judicial settlement of their dispute may prejudice its interests, seeks to intervene. As the Court put it in the *Haya de la Torre* case :

> "every intervention is incidental to the proceedings in a case ; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings" (*I.C.J. Reports 1951,* p. 76).

There is no requirement that the intervenor must independently and as a condition of intervention demonstrate that it has had a distinct dispute with one or both of the parties in litigation which had matured before the bringing of the request to intervene.

6. Italy's continental shelf claims presumably are in its legal interest. They are not easily distinguished from "an interest of a legal nature". The Court cannot deny, and does not deny, the undeniable : that where Italy, juxtaposed as it is geographically within the narrow limits of the Mediterranean Sea on the very continental shelf over which Malta and Libya make conflicting claims, for its part advances claims to some of those same areas of continental shelf, Italy "has an interest of a legal nature . . .". The Italian legal interest not only is eminently plausible, it is so obvious as to be beyond question.

". . . WHICH MAY BE AFFECTED BY THE DECISION IN THE CASE . . ."

7. May Italy's interest of a legal nature be affected by the Court's decision in the case ? In its Application for permission to intervene which has been quoted in pertinent part above, Italy submits that its legal interests will be affected by a decision of the Court which, when applied, would effect the attribution to Malta or Libya of areas to which Italy lays claim, and it illustrates in what manner its interests would be adversely affected.

8. It should be recalled (as the Court failed to recall in 1981 in rejecting Malta's application for permission to intervene) that Article 62 of the Statute specifies that should a State consider that it has an interest of a legal nature which *"may"* be *"affected"* by the decision in the case, it may submit a request to the Court to be permitted to intervene. Article 62 does not provide that, should a State consider that it has an interest of a legal nature which "shall" be "determined" by the decision in the case, it may submit such a request. The State seeking to intervene accordingly need not prove that it has a legal interest that the Court's decision will determine ; it need merely show that it has a legal interest which just "may" be no more than "affected" – prejudiced, promoted or in some way altered. That is not an exigent standard to meet. And Italy has more than met it. If the Court should render a judgment which lays down

> "what principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas . . .",

it is difficult to see how such principles and rules can be asseverated and applied without "affecting" Italy's "interest of a legal nature" in respect to areas of the continental shelf which, it claims, lie between or athwart the properly delimited claims of Malta and Libya and appertain to Italy.

9. It is no answer to say – as, in substance, the Court appears to say – that Italy's interest of a legal nature cannot be affected by the decision in the case because, by the terms of Article 59 of the Statute, "The decision of the Court has no binding force except between the parties and in respect of that particular case". If that answer were good, then Article 62 would be pointless : there would never be a case to which Article 62 should or could apply, since, by reason of Article 59, a third State's legal interest never can be affected by a decision in a case. Article 59 cannot, by any canon of interpretation, be read so as to read Article 62 out of the Statute.

10. The Court endeavours to meet this evident conclusion by maintaining that its interpretation of Article 59 actually does not render Article 62 pointless, for the reason that, while, by the force of Article 59, the legal interest of a third State cannot be affected by a decision in a case to which it is not party, such third State still has the choice afforded by the conjunction of Articles 62 and 59 either of seeking the procedural economy of means which the former affords or the legal immunity which the latter ensures. That is to say, the purpose of Article 62, in the logic of the Court, apparently is not to afford third States the facility of intervention in order to protect or promote an interest of a legal nature which may be affected by the decision in the case, since, by reason of Article 59, no decision of the Court can affect such legal interest of a third State. It is merely to allow the third State to save itself the burden of subsequent, direct litigation against the principal Parties – in the event that there is a jurisdictional basis for such litigation – by permitting it to intervene in their case, if the Court so decides. Such an analysis reduces Article 62 to an improbable procedural convenience which neither its terms nor its *travaux préparatoires* support. It is virtually tantamount to reading Article 62 out of the Statute.

11. Moreover, it cannot be persuasively maintained that a judgment of the Court setting out the applied rules for the division of areas of continental shelf between two States will not even "affect" the legal interests of a third State which lays claims to some of those same areas. To so maintain is to devalue the legal worth of the Court's judgments, to which all mem-

bers of the international community shall give due weight as authoritative holdings of international law.

12. Even if the Court were to hand down a judgment as between Malta and Libya which explicitly is subject to the rights and titles of third States, which expressly reserves competing claims of Italy, and which declares that it is without prejudice to those claims – assuming that the Court were to find itself able to write a judgment on the merits of the case in these legal and geographic circumstances which when applied delimits the shelf between Malta and Libya without treating Italy's intervening claims – the judgment "may" merely "affect" Italy's claims by its reasoning and in so far as its effect is to allot shelf areas (however conditionally) to Malta or Libya which are areas to which Italy also lays claim. This could be so even if the Court's future judgment were to speak of the relative and not the absolute titles of Malta and Libya. The Court could go further. It could limit the scope of its judgment by refraining from indicating the practical application of principles of delimitation to those areas of continental shelf which Italy claims, holding that, as to these areas, delimitation must follow from negotiation or adjudication between or among Italy, Malta and Libya. Such a judgment might satisfy Italy, but would it not constitute a measure of endorsement by the Court of Italy's claims without troubling Italy either to justify those claims or to place them at stake in the current proceedings between the principal Parties? Indeed, such a judgment would in effect acknowledge that Italy "has an interest of a legal nature which may be affected by the decision in the case" were it not for that element of the decision which exempts from its reach the areas which are the object of Italian claims. Thus the more reasonable approach – given the fact that these areas are already in issue between the principal Parties – would be to grant Italy's request to intervene and oblige it to defend its claims. That would do justice not only to Italy but to Malta and Libya, which otherwise could find that the judgment they seek has been truncated to accommodate claims which they would have forgone the opportunity to refute.

"IT SHALL BE FOR THE COURT TO DECIDE . . ."

13. Paragraph 1 of Article 62 provides that, should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. Paragraph 2 provides that : "It shall be for the Court to decide upon this request." In its 1981 Judgment on Malta's application, the Court referred to this provision, and emphasized

> "that it does not consider Paragraph 2 to confer any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the Court the task entrusted to it by that paragraph is to determine the admissibility or

otherwise of the request by reference to the relevant provisions of the Statute." (*I.C.J. Reports 1981,* p. 12, para. 17.)

14. That, however, is not to say that the relevant provisions of the Statute speak for themselves ; rather, they leave room for a substantial margin of appreciation, as has been demonstrated by intermittent discussions in the Court for some 60 years. As Sir Gerald Fitzmaurice pointed out in an article written 25 years ago, Article 62 leaves :

> "room for considerable freedom of appreciation ; and since intervention under Article 62 is not as of right, it must follow that the Court exercises a quasi-discretionary power under it, and is not absolutely bound to grant the request, even if the necessary conditions are present, or there would be no effective difference between this case and that of Article 63. Consequently, the Court is entitled to take into account the question of propriety, appropriateness, weight of interest, etc." ("The Law and Procedure of the International Court of Justice, 1951-54 : Questions of Jurisdiction, Competence and Procedure", XXXIV *British Year Book of International Law* (1958), p. 127.)

15. In exercise of the measure of discretion which Article 62 affords it, the Court in 1981 found that the sort of "non-party" intervention which Malta sought was not intervention within the meaning of the Statute. That was not a necessary conclusion, as the separate opinions of Judge Oda and myself indicated, but it was a not unreasonable one. In this case, the Court could exercise the measure of discretion accorded by Article 62 to admit Italy's intervention, which, while markedly evocative of Malta's application of 1981 in many respects – as counsel for Malta so skilfully argued in the recent oral hearing – nevertheless may be distinguished from it. It may be distinguished in the following respects :

(a) Italy asserts claims to swaths of continental shelf which lie between or athwart some of the Maltese and Libyan claims ; Malta's claims were to areas at the end of a line which would divide the adjacent, not opposite, claims of Libya and Tunisia, and accordingly raised interests which could be taken into account by an indication of a line whose angle but not terminus was required.

(b) Moreover, while Malta described its continental shelf claims in Court at length, it took pains not to place those claims before the Court for decision, while, in contrast, Italy does place its overlapping continental shelf claims "at stake".

(c) Malta sought to intervene in 1981 as a kind of purposeful commentator on the governing principles of international law and their appli-

cation to the claims of Libya and Tunisia, as they might affect the position of Malta. Italy seeks to argue not simply legal principles but to defend concrete zones of material interest with which, one way or another (and unlike the situation which obtained in 1981) the Court will have to deal in this case.

(d) Italy, unlike Malta, requests permission to intervene as a party to the case. Not as a party to a new dispute not submitted in the Special Agreement ; not as a party taking the side of one principal Party against the other in the dispute which the Special Agreement does submit ; not (allegedly) as a party making claims against the principal Parties ; but as a party which seeks permission to defend its claims against what it views as the competing claims of the principal Parties in the very geographic area at issue between them. Italy has denominated its status as that of an "intervening party". That is an apt term. But others may choose – in view of Italy's position that it does not seek to advance claims against Libya and Malta and does not seek a delimitation of its own claims – to see Italy as seeking a kind of non-party intervention. In its 1981 Judgment, the Court debarred "the direct yet limited form of participation in the subject-matter of the proceedings for which Malta here seeks permission . . ." as one which could not be "properly admitted as falling within the terms of the intervention for which Article 62 of the Statute provides" (*I.C.J. Reports 1981,* p. 19, para. 34). But it does not follow that it debarred the somewhat different – direct, limited but different – form of participation in the subject-matter of the proceedings for which here Italy seeks permission, whether it is viewed as party or non-party intervention.

(e) In its Judgment rejecting Malta's application, the majority of the Court insisted on holding that :

> "the very character of the intervention for which Malta seeks permission shows . . . that the interest of a legal nature invoked by Malta cannot be considered to be one 'which may be affected by the decision in the case' within the meaning of Article 62 of the Statute" (*ibid.,* para. 33).

The Court quotes this holding with apparent approval in its Judgment on Italy's application. In my view, which I set out in my separate opinion on Malta's application, this conclusion – which embodied a striking *non sequitur* – was both needless and erroneous. It was needless, for the Court's decision that "the direct yet limited form of participation . . . for which Malta here seeks permission could not properly be admitted as falling within the terms of intervention for which Article 62 of the Statute provides" was sufficient ground to sustain the Court's denial of Malta's request. It was erroneous, for it did not recognize the fact that Malta, by reason of its claims and

> geographical situation, had legal interests which *might* well have been "affected" by the Court's judgment in the *Tunisia/Libya* case. The result of the Court's 1981 Judgment was to establish a link between the object of the intervention and the interests of a legal nature which may be affected by the decision in the case, a link which appears to hold that if the object is limited so as not to put the claims of the intended intervenor at issue, there is *ipso jure* no interest of a legal nature which may be affected by the decision in the case. Since, however, in the current case the Court holds exactly the opposite – namely, that the Italian object is not so limited and Italy does put its claims at issue – it follows not only that, on this ground as well, the Italian application is to be distinguished from the Maltese, but that, by application of the Court's reasoning of 1981 and of the logic of the Court's Judgment in this case, Italy has an interest of a legal nature which may be affected by the decision in this case.

16. Although, as just indicated, the thrust of the Court's Judgment in this case appears itself to lead to the conclusion that Italy has an interest of a legal nature which may be affected by the decision in the case, the Court nevertheless rejects Italy's application for permission to intervene. While the essential ground of its decision appears to be what it views as the absence of a jurisdictional link between Italy and the principal Parties to the case, it also concludes that what Italy seeks is not genuine intervention within the meaning of Article 62. The Court observes that Italy itself conceded that where a State seeks to intervene in order to assert a right equivalent to a mainline claim, that application is not within the ambit of Article 62. It concludes that

> "there is nothing in Article 62 to suggest that it was intended as an alternative means of bringing an additional dispute as a case before the Court . . . or as a method of asserting the individual rights of a State not party to the case".

And since the Court holds that Italy does seek more than the preservation of its rights, that it makes claims with a view to the establishment of its rights, the Court concludes that it may debar Italy's application as not being one for genuine intervention within the meaning of Article 62.

17. The flaw in this analysis is that Italy's request, even if, *arguendo,* it is acknowledged to advance claims against the principal Parties, does not give rise to an additional dispute, except in so far as what is a dispute between two parties would be a dispute between three. It is not possible to contemplate intervention which excludes a third party. Thus Italy's intervention of itself cannot be a factor which places its application outside the bounds of Article 62. The question rather is, is it genuine intervention when measured against the critical criterion set out in the *Haya de la Torre* case :

> "every intervention is incidental to the proceedings in a case ; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings" (*I.C.J. Reports 1951,* p. 76).

The Italian application is addressed to some of the very areas of continental shelf which are in dispute between Malta and Libya and to the dispute over their delimitation. Thus it "actually relates to the subject-matter of the pending proceedings". It is "incidental" to those proceedings, intimately related as it is to the existing dispute between the principal Parties. Accordingly, the Italian intervention is well within the ambit of Article 62. It would be otherwise if Italy sought to make claims against Malta and Libya which were unrelated to the subject-matter of the pending proceedings ; that would not be intervention at all. But clearly that is not the fact. That Italy makes claims of itself is not enough to justify the Court's conclusion that what it seeks is not genuine intervention. On the contrary, what Italy seeks is intervention of a classic kind. The Court's virtually unsupported conclusion that it is not intervention within the meaning of the Statute is not justified by the terms of the Statute, and finds scant support in the *travaux préparatoires* of Article 62 or, for that matter, in the institution of intervention as it is understood in the general principles of law recognized by civilized nations. Nor is it easy to reconcile with the Court's Judgment of 1981 rejecting Malta's application. A primary ground of that Judgment was that Malta's application was inadmissible because it refrained from placing Malta's claims in issue. But in the instant case, the Court rejects Italy's application on the ground that, since it places Italy's claims against Malta and Libya in issue, it is not genuine intervention.

THE ISSUE OF A JURISDICTIONAL LINK

18. Since Italy seeks permission to intervene in order to defend claims to certain continental shelf zones to which Malta and Libya lay claim the Court's Judgment holds that in reality Italy seeks to assert claims and thus establish rights against the principal Parties. From this it deduces that Italy seeks to intervene as a party claimant in a dispute with the principal Parties, with the result that, unlike the Malta case, it is necessary to decide, not "in general", but on the facts of this case, whether the existence of a valid link of jurisdiction with the principal Parties is an essential condition for the granting of permission to intervene. The Court concludes that it is. The remainder of this dissent will consider this supervening question.

19. It is beyond dispute that the Court's jurisdiction invariably is based

upon the consent of the parties impleaded before it. The Court's Judgment in this case holds that such a consensual title of jurisdiction cannot be found in the terms or intendment of Article 62. Accordingly, the Court infers that a State seeking to intervene must do so either with the assent of both of the principal parties to the case, or it must show a separate title of jurisdiction manifesting an earlier consent of the principal parties to litigate with it. This is a conclusion which the Court has reached in the light of "primarily the principle of consent, but also the principles of reciprocity and equality of States". An exception to these principles "could not be admitted unless it were very clearly expressed". While there is much to be said for the Court's position, there are cogent considerations which cut the other way.

20. Article 62 of the Statute provides that the Court shall decide upon a request to intervene, having regard to :

(a) whether the State seeking to intervene "has an interest of a legal nature" which
(b) "may be affected by the decision in the case". There is no further provision, such as
(c) "provided that the State seeking to intervene establishes a title of jurisdiction with each of the principal parties to the case".

The essence of the problem then is to decide whether Article 62 of itself can and does provide the Court with jurisdiction to admit a request for intervention, or whether intervention can be granted only if the intended intervener can demonstrate a separate and express title of jurisdiction.

21. It should initially be observed that, where the Statute means to prescribe a specific title of jurisdiction, it does so expressly. Thus, Article 53 of the Statute, which, like Article 62, is found in Chapter III, "Procedure", provides :

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

By way of instructive contrast, Article 62 does not provide that, before deciding upon a request for permission to intervene, the Court shall satisfy itself "not only that it has jurisdiction in accordance with Articles 36 and 37 . . .".

22. On the face of it, the "plain meaning" of Article 62 rather is that no separate title of jurisdiction is required. That was the conclusion reached some 25 years ago by that most subtle of analysts, Sir Gerald Fitzmaurice, in the article earlier cited, at page 124 :

"The jurisdiction of the Court to entertain third-party intervention is another example of incidental jurisdiction, the general character of which has already been considered in connection with the indication of interim measures, and equally arises from the existence of express provisions of the Statute which confer this jurisdiction upon the Court and allow it to be exercised independently of the specific consent of the parties."

23. Another eminent student of the Court, who, like Fitzmaurice, was later to be elected a member of the Court, reached a similar conclusion in his classic treatise, *The Permanent Court of International Justice* (1934). Professor Manley O. Hudson concluded :

"Article 36 of the Statute provides four sources of the Court's jurisdiction . . . Several additional articles of the Statute relate to the exercise of jurisdiction incidental to that conferred : thus, Article 41 . . . Article 48 . . . Article 53 . . . Articles 60 and 61 . . . Intervention as provided for in Articles 62 and 63 of the Statute may be said to constitute an independent source of the Court's jurisdiction. Under Article 63, a State has a right to intervene . . . under Article 62, it rests with the Court to say whether intervention will be permitted, and the Court should only admit such intervention if, in its opinion, the existence of an 'interest of a legal nature which may be affected by the decision' in the pending case, is sufficiently demonstrated."

. . . . . .

"*Intervention.* Quite apart from the sources of jurisdiction set out in Articles 36 and 37 of the Statute, the Court may acquire contentious jurisdiction as a result of a State's intervention under Article 62 or under Article 63 . . . Article 62 was drafted when it was proposed to confer on the Court a general obligatory jurisdiction ; though that proposal was rejected, no limits were set for the application of Article 62. If two States are before the Court by reason of declarations made under paragraph 2 of Article 36 of the Statute, it seems a derogation from the condition of reciprocity therein laid down to allow a third State which has made no similar declaration to become a party to their case upon its own motion ; yet the problem is not essentially different if two States are before the Court under a special agreement and a third State which is not a party to the agreement seeks to intervene. The jurisprudence of the Court has not set additional conditions for the application of Article 62." (At pp. 360, 369 and 370.)

24. Similarly, Professor Hans Kelsen – of whose authority nothing need be said – concluded :

"No state can be forced into Court against its will. But that does not mean that a state can be party to a case before the Court only together with that state (or those states) with which it has – either specially or generally – agreed upon referring the case to the Court. For Articles 62 and 63 of the Statute provide : [quoting the terms thereof]

. . . . . .

If the Court grants the request submitted by a state under Article 62, or if a state uses its right to intervene under Article 63, the state concerned becomes a party to the pending case although there exists no special or general agreement between this state and the other parties to the case." (*The Law of the United Nations,* 1950, p. 522.)

25. Most recently, the President of the International Court of Justice wrote with respect to the "argument that Article 62 should not be read in isolation" the following :

"This may be so, but reading it within the context of the Statute as a whole, including Article 36, must involve not only reading Article 62 (1) above as subject to Article 36, but also to reading it as intended to be regarded as apart from and independent of Article 36. If this were not so, and Article 62 (1) were to be read subject to Article 36, what would have been more natural than to make the issue of intervention subject to compulsory jurisdiction in, say, a subsection (7) of Article 36 ? Indeed, a cross-reference to Article 36 might have been included in Article 62, making it clear that compulsory jurisdiction as envisaged in Article 36 is really intended to apply in the case of contentious proceedings no less than in the case of intervention. For example, Article 53 of the Statute, dealing with the problem of the non-appearing defendant, contains a specific reference to Articles 36 and 37 in these words : 'The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and law' [9]. It is clearly no answer to say that it is because the defendant State is absent in such a case that this specific reference to Articles 36 and 37 has been inserted. The Statute really requires the issue of jurisdiction and stipulates it expressly." (T. O. Elias, "The Limits of the Right of Intervention in a Case before the International Court of Justice", *Festschrift für Hermann Mosler,* 1983, pp. 163-164.)

[9] "Wherever the Statute requires to be specific, it often does so by cross-references ; e.g., reference in Article 31 (6) to Articles 2, 17 (2), 20 and 24, emphasizing the conditions necessary to be fulfilled by *ad hoc* judges in order to entitle them to be put on terms of complete equality with their colleagues."

26. Nevertheless, despite the contrast between the terms of Articles 53 and 62, and despite the conclusions not only of the foregoing authorities

but of judges of the Permanent Court of International Justice who are quoted below, it is argued that Article 62 must be interpreted in the context of the Statute as a whole ; that a postulate of that Statute is that the consent of States must be obtained in order for the Court to exercise jurisdiction over them ; that the Court's jurisdiction is dealt with in another chapter, on "Competence of the Court", essentially in another article, Article 36 ; and accordingly that an exercise of jurisdiction by the Court where intervention is sought must comport with Article 36 regardless of the absence of an express reference to jurisdictional requirements in Article 62. That is to say, a requirement for a jurisdictional link must be read into the terms of Article 62. If it is, the application of Italy must be denied because it has failed to show that Libya and Malta have assented or specially agreed to its intervention, or that the Court has jurisdiction by the terms of a treaty or convention in force or under the optional clause.

27. There is indeed no denying not only that Article 62 must be read in context but that it must be read consistently with Article 36 and the fundamental postulate of consent of States to the exercise of the Court's jurisdiction. It is precisely in appreciation of that position that it is concluded that Article 62 of itself furnishes sufficient title of jurisdiction to intervene "in the case" – not to bring a new case in the guise of intervention, but to intervene incidentally "in the case". This is so for the following reasons.

28. Paragraph 1 of Article 36 provides that the jurisdiction of the Court "comprises . . . all matters specially provided for in the Charter of the United Nations . . .". By the terms of Article 92 of the Charter, the Court's Statute "forms an integral part of the present Charter". The provision of Article 62 authorizing the Court to permit a State to intervene which shows that it has a legal interest which may be affected by the decision in the case is one to which all parties to the Statute have consented ; on its face, it appears to empower the Court to permit a State to intervene which fulfils only the conditions which that article specifies ; and thus consent to jurisdiction is in this manner specially provided for in the Charter of the United Nations. The fact that this special provision is not express in respect of jurisdiction does not show that it is not special. Indeed, other articles of the Statute, such as Article 41 respecting provisional measures, which afford the Court a limited, incidental jurisdiction, do not expressly refer to jurisdiction. But where in the Statute an implicit investment of special jurisdiction is thought not to suffice, as in Article 53, the Statute makes express reference to the need for "jurisdiction in accordance with Articles 36 and 37 . . .".

29. Moreover, the jurisdiction of the Court under Article 36, paragraph 1, also "comprises . . . all matters specially provided for . . . in treaties and conventions in force". By application of the foregoing reasoning, Article 62 equally provides special provision for the exercise of the Court's jurisdiction, for it is part of the Statute which indubitably is a treaty in force.

30. If it be argued that provisions of the Statute outside of Chapter II

and Article 36 cannot of themselves be read as authorizing the Court to exercise jurisdiction, that argument is refuted not only by the plain meaning and by the foregoing interpretation of Article 62 but by the terms of Article 63. Under Article 63, a State has "the right to intervene in the proceedings" where the construction of a convention to which such State is party is in question in the case. But that right is not conditioned on a demonstration of the Court's jurisdiction beyond that contained in Article 63 itself. Thus an article outside of Chapter II and Article 36 of the Statute, which makes no express reference to jurisdiction, of itself provides sufficient title of jurisdiction. If Article 63 does this, why cannot Article 62 ? It is the more plausible that Article 62 does, linked in substance as it is to Article 63.

31. Article 63 unconditionally authorizes intervention where the State seeking it is party to a treaty. Thus even where such a State is party to a treaty which contains provision (as in an annexed protocol) for submission to the Court's jurisdiction in disputes over the interpretation or application of the treaty, and that State and the parties to the principal case have *not* adhered to the protocol, the Court apparently would have jurisdiction to admit the intended intervenor to the case. If an additional jurisdictional link need not be established in such an instance under Article 63, why, again, must it be established under Article 62 ? Why should there be so fundamental a cleavage between the application of conventional and of general international law ?

32. It is recognized that one may argue that, since Article 63 provides for "a right to intervene in the proceedings", while Article 62 provides that it shall be for the Court to decide upon a State's request to intervene, the "right" of intervention under Article 63 is tantamount to an express grant of jurisdiction whereas the possibility of intervention under Article 62 is not. This is a plausible but not a necessary construction of the two articles. It is no less plausible to argue that Articles 62 and 63 equally accord the Court jurisdiction to admit intervention, but that Article 63 speaks of a "right to intervene" because all that need be ascertained is that a State which seeks to exercise that right is party to the convention whose construction is at issue, whereas, under Article 62, the Court must decide whether the State that requests permission to intervene "has an interest of a legal nature which may be affected by the decision in the case". Since the Court necessarily must exercise its judicial appreciation of whether that State meets those criteria, Article 62 could not speak of a "right" of intervention.

33. It is difficult to accept the argument that the failure to specify a jurisdictional link in Article 62 was an oversight, that when the Statute of the Permanent Court of International Justice was drawn up originally, it provided for universal compulsory jurisdiction under Article 62, and that when the Statute was revised before its adoption to provide for limited jurisdiction in the terms contained in Article 36, its drafters neglected to bring Article 62 into express consonance with the intent of Article 36. As

shown by the debates among judges at the outset of the Court's life in 1922, this theory, while advanced by one judge of the Permanent Court of International Justice, was denied by others in no less a position to know than he who supported it. Moreover, if the theory ever was credible, it can no longer be, in view of the fact that the Statute was carefully examined and somewhat revised in 1945. Article 62 itself was the subject of revision ; three words were deleted from its English text. Can it be supposed that, if it were the understanding or apprehension, in the years preceding, that Article 62 contained an oversight, it would not have been corrected in the course of the 1945 revision of the Statute ? Furthermore, it is unpersuasive to argue that Article 62 was not revised to take account of the rejection of general compulsory jurisdiction in 1920 and 1945 because it was assumed that Article 62 of itself contained no title of jurisdiction. That argument runs counter to views expressed in the Permanent Court of International Justice both by Judge Altamira, who was the source of the claim that Article 62 had not been revised through oversight, and of those several judges who maintained that Article 62 of itself grants the Court jurisdiction.

34. While the early debates among the judges of the Permanent Court of International Justice demonstrate sharply divergent and prescient views on the problems of a jurisdictional link, it is significant that the President of the Court at that initial juncture terminated debate on the question with the following ruling :

> "The President stated that he could not take a vote upon a proposal the effect of which would be to limit the right of intervention (as prescribed in Article 62) to such States as had accepted compulsory jurisdiction. If a proposal in this sense were adopted, it would be contrary to the Statute." (*Preliminary Session of the Court,* Seventeenth Meeting, 24 February 1922, p. 96.)

35. To read into Article 62 an additional requirement of jurisdiction could in practice confine the institution of intervention to marginal limits. There is no reason to believe that the drafters of the Statute meant to restrict intervention to the unlikely circumstances in which the intervenor could establish – apart from the terms of Article 62 – a basis of jurisdiction with each of the principal parties to the case. On the contrary, the institution of intervention was regarded as having significant potential. In Court exchanges in 1922, Lord Finlay went so far as to say that, ". . . it was thanks to the existence of this Article that some States had accepted the Statute of the Court" (and he said this in opposing a proposal to condition reliance upon Article 62 upon a showing of jurisdiction, a proposal which Judge John Bassett Moore then said "amounted to a proposal for the amendment of Article 62 of the Statute" which was "quite inadmissible") (Seventeenth Meeting, *loc. cit.,* pp. 94, 95). The Court should not now prejudice that potential by imposing a jurisdictional condition on Article 62 which its terms do not contain.

36. The terms of Article 81, paragraph 2 *(c)*, of the most recently adopted version of the Rules of Court were not intended to introduce and do not introduce a jurisdictional requirement where none existed before. The Rules of Court could not of course prescribe, as of 1978, a condition not contained, expressly or impliedly, by the governing provisions of the Statute. Paragraph 2 *(c)* of Article 81 of the Rules of Court recognizes this by providing for the specification of "*any* basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case". The Court acted with deliberation in purposefully specifying "any" basis of jurisdiction rather than "the" basis of jurisdiction. In so doing, the Court meant to avoid prejudging and did not prejudge the question of whether a title of jurisdiction is a necessary precondition of intervention under Article 62. Its intention was merely to draw attention to the point and to ensure that a State which could indicate such a title of jurisdiction should so inform the Court. This is demonstrated by the unequivocal statements which the then President of the Court and the Chairman of the Rules Committee made when the Rule was introduced, debated and adopted by the Court. Thus to treat Article 81, paragraph 2 *(c)*, of the Rules as informative rather than conditional is not to make it – as was claimed in the oral hearing on Italy's application – "meaningless", contrary to the canons of interpretation. Rather, it is to give it the exact meaning which the drafters of that provision intended.

37. Finally, there is the question of whether a title of jurisdiction in case of intervention beyond that accorded by Article 62 is ever required. It was suggested by counsel for Italy that, if ever required, it would be not in a truly incidental case of intervention such as Italy's but where, under the guise of intervention, a State seeks to bring a new "mainline case" – to bring its own claims against the principal parties to the case. The Court has seized upon this suggestion to hold that Italy actually does seek a decision on the rights it has claimed against the principal Parties and that, therefore, a specific title of jurisdiction is required.

38. It is believed that in this the Court is in error. It may not be wrong to conclude that Italy seeks to assert it own claims when it places its defence of Italian interests in specified zones of the continental shelf "at stake" ; at any rate, that is arguable. But the Court is on doubtful ground in holding that, if Italy does so, it is seeking a decision on claims which are not incidental to the proceedings in the case and which thus require demonstration of a specific title of jurisdiction. For, as observed above, the object of Italy's claims are areas of the continental shelf which already are in dispute between the principal Parties. The new element which Italy seeks to insert in the case at bar and to assert against its principal Parties is Italy, i.e., Italy's very presence in the case ; instead of claims to the areas in question being made before the Court by two States, they would, if Italy were to be admitted, be made by three. It is of the essence of intervention that three rather than two parties take part in the case. To hold that, by

reason of its intervention and the claims on which it seeks decision, Italy would be bringing a claim which is new and thus outside the ambit of the proceedings and the Special Agreement which has given rise to them, and that, accordingly, intervention must be debarred in the absence of the principal Parties' consent or a specific jurisdictional link, seems tantamount to holding that intervention regularly requires a showing of jurisdiction beyond that which Article 62 contains. At the same time, the Court disclaims that conclusion and limits the requirement of a specific title of jurisdiction to the facts of Italy's intervention. That suggests that there may be instances of intervention in which a requirement of a specific title of jurisdiction would not be imposed, for example, where the intervenor does not assert claims against the principal parties.

THE OUTLOOK FOR INTERVENTION

39. In its Judgment rejecting Malta's application to intervene, the Court went far towards excluding what might be termed "non-party" intervention. That was not a necessary holding but, on the facts of Malta's application, it was a defensible holding. Now on the facts of the case before it the Court proceeds to exclude intervention by a State as a party unless that State can show what normally would render intervention unnecessary in the first place : links of jurisdiction with each of the principal parties to the case. In these circumstances, the outlook for intervention in future cases before the Court is beclouded. Apart from instances where the principal parties consent to intervention, it appears to be confined to the case where a State, seeking to intervene as a party, and to bring claims within the bounds of the case against the principal parties before the Court, at the same time can, apart from Article 62, demonstrate a title of jurisdiction with each of the principal parties to the case ; and, perhaps, to the case where a State, seeking to intervene as a party, but lacking such jurisdictional links, does not assert claims (a case also unlikely to occur). In my view, reducing Article 62 to such narrow and implausible confines is not in conformity with the terms of that article or with the intentions of the drafters of the Statute. Whether, in fact, the Court's Judgment in this case, when taken together with that rejecting Malta's application, actually leaves wider scope for intervention than appears is to be hoped, but it is not now apparent.

(Signed) Stephen M. SCHWEBEL.
